IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 547 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PALI RAMJIBHAI LAXMANBHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
M/S THAKKAR ASSOC. for Appellant(s) : 1,
MR PD BHATE, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 17/12/2007

ORAL JUDGMENT

This appeal arises out of a judgment and order dated 9th June 1997 rendered by the learned Additional Sessions Judge, Ahmedabad Rural in Sessions Case

No.21/96.

2. The appellant was original accused No.1 who was charged with offence punishable under section 363, 366 and 376 of the Indian Penal Code. There were two more accused, who were also charged with similar offence. Accused No.2 expired during trial. Accused No.3 was acquitted of the charges. Appellant herein, original accused No.1 was, however, convicted under section 363 and 366 of the Indian Penal Code, but acquitted under section 376 of the Indian Penal Code. He was awarded sentence of 7 years of rigourous imprisonment. He has, therefore, filed this appeal.

3. The prosecution case was that on 17th December 1994 at about 5 O' clock in the evening, the accused had kidnapped one Bhartiben from the lawful guardianship of her guardian. As per the prosecution, date of birth of Bhartiben was 19.7.78. She was thus aged 16 years and 5 months (approximately) on the date of the incident.

4. PW-1, Bhartiben was examined at Ex.7. She stated that she knew the accused and they were neighbours before the accused changed his residence. She stated that the accused used to go to her house frequently. On the date of the incident, accused met her near the field and forcibly took her in a rickshaw. She was taken to the house of maternal aunt of accused No.1. When she was made to sit the rickshaw, her younger brother Mahendra was also present. From the said location at Khanpur, they went

to Paldi walking. They thereafter, boarded a luxury bus and came to Rajkot. They stayed at appellant's sister's house for 4 days. Four more days they stayed with other sister's house at Rajkot. They used to live like husband and wife. Appellant forcibly had sexual intercourse with her there on number of times. Once when they had gone to a garden at Rajkot, her uncle Vithalbhai saw them, upon which appellant ran away. Her uncle brought her to Ahmedabad. In the cross-examination, she admitted that at Rajkot, both of them used to go out alone. Appellant also used to take her to temple at Rajkot. She admitted that about 6 months before the incident, she had herself photographed with the accused at Gurukul.

5. PW-2, Tribhuvanbhai, father of the girl had lodged the complaint after two days of his daughter missing.

6. PW-5, Vithalbhai, Ex.15, is the uncle of the girl who had found her in a garden at Rajkot. Importantly, in his cross-examination, he sated that when he caught the appellant and Bhartiben at Rajkot, a crowd of people had gathered there. At that time, both the appellant and Bhartiben were trying to run away. Because of that, he physically lifted Bhartiben and put her in a rickshaw and thereafter brought her to Ahmedabad.

7. From the evidence on record, it is amply clear that Bhartiben had been a willing and voluntary partner in running away with the appellant. Her

deposition is amply clear in this regard, though she has tried to disguise it as the forcible act on the part of the appellant. She was taken away at 5 O' clock in the evening from a place which was in full public view. She admitted that from the said place, her house could be seen. There were other members of the public also and her younger brother was also with her. She made no complaint or raised any alarm.

There are certain letters written by her to the appellant which suggest previous romantic feeling between the two. She was also photographed with the appellant. Most importantly, PW-5, Vithalbhai, stated that when he caught the couple at Rajkot, both of them were trying to run away and he had forced Bhartiben to accompany him in a rickshaw. All these would lead no manner of doubt that Bhartiben was a willing partner in the entire episode. Additionally, one also finds that she had repeated sexual intercourse with the appellant with full consent. Dr.Lakhaben, PW-7, Ex.23 in physical examination of the girl found no marks of injury and she found that her hymen was ruptured. In her cross-examination, she stated that upon physical examination of the girl, she was of the opinion that the girl was used to sexual intercourse. This additionally shows that the girl was a willing partner in running away with the appellant herein.

7. The question, however, is despite which, can the appellant be convicted under sections 363 and 366 of the Indian Penal Code. Section 363 makes kidnapping of a minor punishable. On record there is deposition

of Manojkumar Bhavsar, PW-6, Ex.18. He was performing duty as in-charge Sheristadar in the Health Department of the Ahmedabad Municipal Corporation. He produced the birth certificate of Bhartiben. The date of birth recorded is 19th July 1978. In his cross-examination, however, he agreed that often information about birth of a child is sent without the name of the child, upon which birth date is registered without name. He stated that if an application is made by the parent or guardian of a child within 15 days, the name is entered in the register. He agreed that name of Bhartiben was added subsequently. He, however, could not state as to when the name was added. He stated that the Corporation has no documents to show as to when the name was added. He also could not state whether the same could have been added in recent past.

Significantly, there is no medical evidence assessing the age of the girl. Though it is stated that the girl had studied upto 7th standard, her school leaving certificate was also not produced.

8. It would thus appear that the age of the girl was not established with a degree of certainty required in a criminal prosecution. It is true that ordinarily, birth certificate would render an authentic piece of evidence to establish the age of a person. In the present case, however, defence had raised a reasonable doubt about the name of the girl being added subsequently and possibility of the same having been added in recent past could not be completely ruled out. Officer of the Municipality,

could not state with any degree of certainty as to when the name was added. He could not produce any documentary evidence to show as to on what basis and at which point of time, the name was added in the birth register. The entire issue could have been different beyond the pale of suspicion if the prosecution had also produced the school leaving certificate. This was, however, not done. Exact age of the girl, therefore, remained unproved.

9. Additionally, I also find that there was no element of taking the girl away from the care of the lawful guardian. Even if she was, therefore, not above 18 years of age, the appellant could not have been convicted under section 363 of the Indian Penal Code. As noted earlier, the girl had herself eloped with the appellant. She was aware about her actions. She was mature enough to understand the repercussions of her steps. Despite which, she left her parents' home and stayed with the appellant on her free will. Both of them stayed as husband and wife. They enjoyed the marital bliss. In fact, she was unwilling to accompany her uncle when the couple was spotted in a garden at Rajkot and that would demonstrate that the appellant was not guilty of offence under section 363 and 366 of the Indian Penal Code.

10. Under the circumstances, conviction recorded by the Trial Court cannot be sustained. The appellant is acquitted of the charges. His conviction is set aside. The appeal succeeds and disposed of accordingly. Bail bond stands cancelled. Fine if

paid shall be refunded.

(Akil Kureshi, J.)

(vjn)